John T. Jones Construction Co., Inc. *and* Carpenters' District Council of Kansas City & Vicinity, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL–CIO. Cases 17–CA–22607, 17–CA–22614, and 17–CA–22708

June 4, 2007

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On June 8, 2006, Administrative Law Judge Lana H. Parke issued the attached Decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order as modified.[2]

In this backpay case, the judge found, among other things, that contributions to benefit funds made by interim employers on behalf of the discriminatees are not an appropriate offset against the discriminatees' gross backpay. We agree.

At the time of their termination, the discriminatees were employed on a prevailing wage job, and the Respondent paid them their wages and an additional amount in lieu of benefits. These additional moneys in lieu of benefits were included in determining the gross wages for the discriminatees. During the backpay period, the discriminatees worked for employers who paid wages and made contributions to a pension fund and health care plan on behalf of the discriminatees.

The judge found no merit to the Respondent's contention that the fringe benefit contributions from the interim employers should be offset against the discriminatees' backpay claims. The judge found the Respondent's contention contrary to *Tualatin Electric, Inc.,* 331 NLRB 36, 42–43 (2000), enfd. 253 F.3d 714 (D.C. Cir. 2001), in which we held that fringe benefit contributions by an interim employer are not an offset to gross wages.[3]

We agree with the judge. Retirement benefits earned during interim employment that are equivalent to what would have been earned absent the discrimination are properly offset against gross retirement benefits. But retirement *benefits* earned from interim employment are not deducted from gross *wages*, and wages earned from interim employment will not offset benefits that would have been earned absent the discrimination. Id. at 42–43 and fn. 14 (citing the NLRB Casehandling Manual, Part Three, Compliance Proceedings, Sec. 10535.3).[4] Similarly, insurance or health plan benefits are not treated as fungible with wages for backpay purposes, whether the benefits are earned during the interim employment and the wages would have been earned absent the discrimination, or vice versa. See *Glen Raven Mills, Inc.*, 101 NLRB 239, 250 (1952), modified on other grounds 203 F.2d 946 (4th Cir. 1953), cited in the NLRB Casehandling Manual, Part Three, Compliance Proceedings, Section 10535.4. Moreover, it is a respondent's burden to show that interim benefits were equivalent in nature, and therefore appropriately offset, against those lost as a result of the discrimination. See *Laborers Local 158 (Worthy Bros.)*, 301 NLRB 35, 38 (1991), enfd. mem. 952

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, the Respondent asserts that some of the judge's rulings, findings, and conclusions demonstrate bias. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[2] We shall modify the judge's recommended Order to include the total amount of backpay due. In adopting the judge's finding that the Respondent failed to demonstrate that discriminatee Ryan Reynolds would have worked fewer hours during the interim period, Chairman Battista finds it unnecessary to pass on the judge's conclusion that Project Manager Roger Guida's testimony, concerning Reynolds' absences, would have been insufficient to meet the Respondent's burden had that testimony been supported by documentary evidence.

[3] Our dissenting colleague contends that *Tualatin Electric* is not "compelling precedent," because the Board's decision "did not explicitly reference the instant issue at all." We find no merit to our colleague's contention. In *Tualatin Electric*, the judge expressly held that benefit contributions from interim employers are not an offset against gross backpay even where—as here—the gross wages include wages in lieu of benefits. 331 NLRB at 42. The Respondent filed exceptions, there is no indication in the Board's decision that the respondent did not except on this issue, and the Board adopted the judge's findings. The absence of any reference to this issue by the Board necessarily means that the Board rejected the respondent's exceptions and agreed with the judge's finding, and indicates that the Board had nothing to add. The Board's adoption without comment of that finding, therefore, does not diminish its precedential value.

[4] The dissent correctly points out that the NLRB Casehandling Manual is not binding on the Board. The Board, however, is free to consider and cite the manual when reviewing backpay calculations, and indeed often does so. See, e.g., *Aluminum Casting & Engineering Co.*, 349 NLRB No. 18, slip op. at 5 (2007); *Ybarra Construction Co.,* 347 NLRB No. 79, slip op. at 2 fn. 3 (2006), Order supplemented by 348 NLRB No. 66; *Demi's Leather Corp.*, 333 NLRB 89, 91 (2006).

F.2d 1393 (3d Cir. 1991). Here, the Respondent provided no benefits to employees, only wages; the interim benefits received by the discriminatees were not available as wages. In these circumstances, the Respondent has failed to show that the wages it paid are equivalent in nature to the interim benefits received by the discriminatees.[5]

The dissent contends that neither *Glen Raven Mills*, supra, nor *Laborers Local 158 (Worthy Bros.)*, supra, are controlling here because they do not address the narrow issue of whether "the benefits earned from the interim employer are to be offset against amounts in lieu of benefits due from Respondent." But every issue is one of first impression if characterized narrowly enough. The issue here is whether the Respondent has shown that the interim benefits were fungible with the wages in lieu of benefits, and it has not done so. Simply referring to wages as "wages in lieu of benefits" does not make those wages equivalent in nature to actual benefits.

Our dissenting colleague also argues that the employees will receive a windfall if interim fringe benefit contributions are not considered an offset against gross backpay. We disagree. The Board's backpay policies attempt, as best as practicable, to award the employees what they would have received absent the discrimination against them. Refusing to permit the Respondent an offset for interim benefits when it itself offered no benefits does not amount to a windfall for the affected employees. Rather, as the judge in *Tualatin Electric* stated, "any fringe benefit payments [earned in this circumstance] must be likened to supplemental income, payment of which is not deductible as interim earnings. To require otherwise would be inimical to the policies and purposes of the Act." *Tualatin Electric, Inc.*, 331 NLRB at 42 (fn. omitted).

[5] Cf. *United Enviro Systems*, 323 NLRB 83, 83–84 (1997) (deducting from net backpay, as equivalent of wages: (1) profit-sharing cash payment, made on separation from interim employer; and (2) pension-plan distribution, which employee had option of receiving in cash). Here, by contrast, the discriminatees received cash payments from the Respondent in lieu of benefits, but they did not have the option of receiving their interim benefits in the form of cash payments.

As the General Counsel explains, from the standpoint of the discriminatees, the Respondent's immediate cash payments might well have been superior to the uncertain and deferred plan benefits earned during interim employment. In any case, although the Respondent may have labeled its payments-in-lieu as the equivalent of benefits for purposes of Missouri's prevailing wage law, the discriminatees' interim benefits were *not* the equivalent of the Respondent's payments-in-lieu for the remedial purposes of our Act.

Contrary to the Respondent, we see no conflict between our *Tualatin Electric* and *United Enviro Systems*, supra. The Respondent's assertion that *United Enviro Systems* (decided in 1997) somehow overruled the Board's *later* decision in *Tualatin Electric* (2000) is obviously mistaken.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, John T. Jones Construction, Inc., Springfield, Missouri, its officers, agents, successors, and assigns, shall make whole the employees named below, by paying them the total backpay amounts set forth below, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholding required by Federal and State laws.

	Total Backpay Due
Brian Estenson	$12,932.80
Ryan Reynolds	7,005.79
Sterling Jason Hammons	5,669.51
Bob King	11,555.26
Total:	$37,163.36

Dated, Washington, D.C. June 4, 2007

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part.

My colleagues adopt the judge's finding that fringe benefits contributions from interim employers are not an appropriate offset against the discriminatees' backpay claims. Relying on a judge's decision in *Tualatin Electric, Inc*., 331 NLRB 36, 42–43 (2000), enfd. 253 F.3d 714 (D.C. Cir. 2001), my colleagues reject the Respondent's contention that the interim employers' fringe benefit contributions are an offset against the discriminatees' gross backpay claims, which consist of hourly wages plus an amount in lieu of benefits. Contrary to my colleagues, I find merit to the Respondent's contention.

At the outset, I do not agree that *Tualatin Electric* constitutes compelling precedent on this issue. The judge in that case said that the fringe benefits paid by the interim employer were like supplementary income, and the judge therefore declined to offset such benefits from gross backpay. He cited no case in support of this position. The Board's decision dealt with other issues, and did not explicitly reference the instant issue at all. Similarly, the D.C. Court's decision enforcing the Board's order in that case made no mention of this issue.

Moreover, application of the judge's decision in *Tualatin Electric* constitutes a windfall for discriminatees in

a backpay case. Under that rationale, if a respondent paid $12 in wages and no fringe benefits, and an interim employer paid $10 per hour in wages and $2 per hour in fringe benefits, the discriminatee would receive $2 per hour for lost wages. Thus, for the period of interim employment, the discriminatee would wind up with $12 per hour ($10 and $2 in backpay) *and* the $2 per hour in fringe benefits. In short, the discriminatee would be better off financially than he would have been absent the discrimination. It is axiomatic that a remedy is supposed to compensate the discriminatee for his loss, not make him better off.

The majority contends that the interim benefits here are not fungible with wages, and thus are not an appropriate offset. That is, wages are only wages, and benefits are only benefits, and each can be set off only against its equivalent. The majority's contention in this regard effectively ignores the fact that the Respondent paid wages to employees and an additional amount "in lieu of benefits." These latter amounts were considered an appropriate substitute for the benefits. In essence, the Respondent itself has separated its compensation into two components, one of which is wages and the other of which is a dollar figure in lieu of benefits. Thus, as a matter of equity and as a matter reflecting the facts of this case, it is appropriate to set off interim wages from the Respondent's wages and interim benefits from the Respondent's payment for benefits.[1]

Finally, Sections 10535.3 and 10535.4 of the Board's Casehandling Manual (Part Three) Compliance Proceedings (CHM) (1993) do not resolve the issue. The provisions provide that benefits earned from interim employment are to be offset from gross retirement, insurance, or plan benefits. However, the issue here is different. It is whether the benefits earned from the interim employer are to be offset against amounts in lieu of benefits due from the Respondent. In any event, the CHM is a publication of the General Counsel (a party in this case); it is not binding on the Board (charged with deciding the case).

In sum, the judge's finding that interim contributions are not an offset against gross backpay is not well grounded in Board precedent, and results in a windfall to the discriminatees. I, therefore, would reverse.

[1] *Glen Raven Mills, Inc.*, 101 NLRB 239, 250 (1952), modified on other grounds 203 F.2d 946 (4th Cir. 1953), and *Laborers Local 158 (Worthy Bros.)*, 301 NLRB 35, 38 (1991), enfd. mem. 952 F.2d 1393 (3d Cir. 1991), cited by the majority are not controlling. Although the wages and benefits in *Glen Raven Mills* were treated separately, there was no contention or facts that the respondent, as here, paid wages in lieu of benefits. *Worthy Bros.* dealt only with the fact that the interim pension plan was not shown to be the equivalent of the respondent's pension plan.

Dated, Washington, D.C. June 4, 2007

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

Stanley D. Williams, Esq., for the General Counsel.
Donald W. Jones, Atty. (Hulston, Jones, & Marsh), of Springfield, Missouri, for the Respondent.
Michael Stapp, Atty. (Blake & Uhlig), of Kansas City, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. The National Labor Relations Board (the Board) issued an unpublished Order in the above-captioned matter dated December 16, 2004, which directed that John T. Jones Construction Co., Inc. (Respondent) take certain affirmative action, including making Brian Estenson, Ryan Reynolds, Sterling Jason Hammons, and Bob King (respectively, Estenson, Reynolds, Hammons, and King) whole for any loss of earnings and other benefits suffered as a result of unlawful discrimination against them.

A controversy having arisen over the amount of backpay and benefit compensation due under the terms of the Board's Order, the Regional Director for Region 17 of the Board issued a compliance specification and notice of hearing on December 15, 2005.[1]

I heard this matter in Springfield, Missouri, on March 1 and 2, 2006. All parties submitted posthearing briefs.

Issues

1. Whether the backpay periods calculated by the General Counsel for each discriminatee are appropriate.

2. Whether the General Counsel appropriately utilized a comparable employee analysis in determining the number of hours discriminatees would have worked during the backpay period.

3. Whether the General Counsel's backpay and benefit computations are appropriate.

4. Whether Respondent sustained its burden of showing that any discriminatee failed to mitigate backpay by making a reasonable search for interim employment.

5. Whether Respondent sustained its burden of showing that any discriminatee concealed interim earnings.

[1] The General Counsel twice amended the specification at the hearing, altering the alleged backpay figures for each discriminatee, the accuracy of which Respondent denied. At the hearing, Respondent moved to strike the pleadings, contending that Hammons, Estenson, and King had forfeited their right to a make-whole remedy by giving perjured testimony in April 2005 at a postelection hearing on objections and challenges. I denied the motion.

FINDINGS AND CONCLUSIONS

I. THE BOARD'S ORDER

The Board's unpublished Order directed that Respondent effect the recommended Order of Administrative Law Judge (the judge), Margaret G. Brakebusch, in her decision (JD(ATL)–50–04) dated September 24, 2004, which states in pertinent part:

> Take the following affirmative action necessary to effectuate the policies of the Act:
>
> (a) Within 14 days from the date of this Order, offer Brian Estenson, Ryan Reynolds, Sterling Jason Hammons, and Bob King full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.
>
> (b) Make Brian Estenson, Ryan Reynolds, Sterling Jason Hammons, and Bob King whole for any loss of earnings and any other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

The Order further adopted the judge's remedy that compensation to Estenson, Reynolds, Hammons, and King be computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

II. THE GENERAL COUNSEL'S BACKPAY CALCULATIONS

Based upon its review of Respondent's payroll records following the Board's Order, Region 17 determined that the wages and hours of comparable employees best approximated the compensation each discriminatee would have received had Respondent not unlawfully fired him.[2] In designating comparable employees, the Region selected individuals less senior than the respective discriminatee who performed the same work during the relevant time period. The Region also queried the discriminatees as to efforts to secure work following termination and work performed during the relevant backpay period along with attendant expenses. Based on the discriminatees' responses, the Region calculated net interim earnings (gross interim earnings less expenses). Utilizing the pay rates and hours worked of the comparable employees, less the net interim earnings of the discriminatees, the Region calculated the compensable amounts due each discriminatee as detailed below.

[2] Robert A. Fetsch, Region 17 compliance officer, testified at the hearing regarding the calculations detailed herein.

A. Brian Estenson

At the time of his termination, October 31, 2003, Respondent employed Estenson as a carpenter on the Southwest Wastewater Treatment Project in Springfield, Missouri (SWWTP), a prevailing wage job.[3] Respondent paid Estenson $18.33/hour plus, in compliance with the prevailing wage requirement, $6.65/hour in lieu of fringe benefits. Respondent unlawfully terminated Estenson on October 31, 2003. The General Counsel fixes Estenson's make-whole period from date of termination to June 5, 2004, when, by the Region's analysis, representative hours for Estenson on SWWTP ended.

The General Counsel computed Estenson's gross backpay for the make-whole period based on the allegedly comparable earnings of the following carpenters employed by Respondent during the make-whole period as indicated by their respective pay periods:

Ricky Johnston	11/08/03—02/14/04
Bruce Wales	02/21/04—03/13/04[4]
Dallas Black	05/01/04—06/05/04[5]

The General Counsel computed Estenson's net backpay for the make-whole period by subtracting his alleged calendar quarter net interim earnings[6] from his calendar quarter gross backpay, arriving at the following figures:

[3] A "prevailing wage" job is one funded by public moneys for which the contracting governmental agency requires that employees working on the project be paid the area standard or "prevailing" wages. The parties stipulated that prevailing wages in Greene County, where Springfield is situated, are the rate of the relevant union contract wage and benefit package minus the industry advancement fund. Here, Respondent treated the prevailing-wage moneys it paid employees as taxable wages, and the Region included them in its gross wage computation for each discriminatee.

[4] Formerly employed by Respondent as a journeyman carpenter, David Wales worked as a foreman carpenter at a wage rate of $19.33/hr. during the relevant period. Based on its conclusion that foreman carpenter was a standard progression for Respondent's journeyman carpenters, the Region utilized Wales' $19.33/hr. wage rate as Estenson's backpay benchmark during the applicable period.

[5] The Region did not credit Estenson with any backpay during the gap reflected between the employment of David Wales and Dallas Black, as no comparable employee existed during that period of time.

[6] Net interim earnings are interim earnings less interim expenses.

Quarter	Gross Backpay	Prevailing Wages	Total Gross Backpay	Interim Earnings	Expenses	Net Interim Earnings	Net Backpay
IV/03	$4,339.65	$1,429.77	$5,905.75	$1,068.00	$14.60	$1,053.40	$4,852.325
I/04	6,786.49	2,367.45	9,153.94	6,468.00	60.00	6,408.00	2,745.94
II/04	3,918.05	1,416.46	5,334.51	0.00	35.00	0.00	5,334.51

TOTAL NET BACKPAY: $12,932.80

Following his discharge, Estenson placed his name on the union employment call list, registered with the Missouri employment office, and visited various construction jobsites seeking employment. His listed expenses reflect, for each respective quarter, his estimated job search transportation costs of 40 miles at $.365 per mile; and 160 and 360 miles at $.375 per mile. Estenson secured the following employment for the following dates: December 15, 2003, to March 7, 2004, Good Labor, Inc.

B. Ryan Reynolds

At the time of his termination, February 2, 2004, Respondent employed Reynolds as a laborer on SWWTP. Respondent paid Reynolds $14.53/hours plus, in compliance with the prevailing wage requirement, $6.35/hours in lieu of fringe benefits. Respondent unlawfully terminated Reynolds on February 2, 2004. The General Counsel fixes Reynolds' make-whole period from date of termination to August 6, 2004, the approximate date he started law school.

The General Counsel computed Reynolds' gross backpay for the make-whole period based on the allegedly comparable earnings of the following laborer employed by Respondent during the make-whole period as indicated:

Daniel Shane Landers 02/07/04—08/14/04

Prior to his discharge, Reynolds worked fewer than 40 hours in all weeks but two. Daniel Landers worked 19-percent more hours during Reynolds' make-whole period than Reynolds worked during his pretermination work period. Guida testified that Reynolds' reduced work hours were due to his having called in sick "quite a bit" and having taken discretionary time off for school.

The General Counsel computed Reynolds' net backpay for the make-whole period by subtracting his alleged calendar quarter net interim earnings from his calendar quarter gross backpay, arriving at the following figures:

Quarter	*Gross Backpay*	*Prevailing Wages*	*Total Gross Backpay*	*Interim Earnings*	*Expenses*	*Net Interim Earnings*	*Net Backpay*
I/04	$4,207.37	$1,806.25	$6,013.62	$3,059.88	$0.00	$3,059.88	$2,953.74
II/04	7,703.82	3,215.68	10,919.50	9,064.96	845.00	8,219.96	2,699.54
III/04[7]	4,718.91	1,807.55	6,526.46	6,251.58	1,077.63	5,173.95	1,352.51

TOTAL NET BACKPAY: $7,005.79

[7] The date of this quarter reads as corrected at the hearing.

Following his discharge, Reynolds secured the following employment for the approximate following dates:

02/20/04 to 03/27/04	Artisan Construction	Springfield
04/18/04 to 06/04/04	HBC	Springfield
06/09/04 to 06/30/04	Bender Construction	St. Louis

Reynolds' listed expenses reflect the following: travel costs connected with his job search in St. Louis, relocation to St. Louis upon obtaining work, uniform costs during employment with Bender Construction, during the third quarter 2004, commuting costs from St. Louis to Reynolds' job with Bender Construction in O'Fallon, Missouri, beyond commuting costs engendered during Reynolds' employment with Respondent, and costs of carpentry tools purchased during employment with Bender Construction.[8]

[8] According to Reynolds, he expended $300 for a plumb laser, a shark saw, a screw gun, and miscellaneous hand tools, which enabled him to be a competitive worker and which he has thereafter utilized in his own construction company. I accept Reynolds' testimony regarding the extent and use of his equipment purchases.

C. Sterling Jason Hammons

At the time of his termination, February 13, 2004, Respondent employed Hammons as a carpenter on SWWTP. Respondent paid Hammons $18.33/hours plus, in compliance with the prevailing wage requirement, $6.65/hours in lieu of fringe benefits. Respondent unlawfully terminated Hammons on February 13, 2004. The General Counsel fixes Hammons' make-whole period from date of termination to about August 21, 2004, when, by the Region's analysis, representative hours for Hammons on SWWTP ended.

The General Counsel computed Hammons' gross backpay for the make-whole period based on the allegedly comparable earnings of the following carpenters employed by Respondent during the make-whole period as indicated:

Jim Michels	02/21/04—05/29/04
David Mobley	06/05/04—08/21/04

The General Counsel computed Hammons' net backpay for the make-whole period by subtracting his alleged calendar quarter net interim earnings from his calendar quarter gross backpay, arriving at the following figures:

Quarter	Gross Backpay	Prevailing Wages	Total Gross Backpay	Interim Earnings	Expenses	Net Interim Earnings	Net Backpay
I/04	$2,217.21	$ 788.06	$3,005.27	$ 0.00	$ 0.00	$0.00	$3,005.27
II/04	7,689.49	2,773.10	10,462.59	7,798.35	0.00	7,798.35	2,664.24
III/04	4,303.20	1,596.23	5,899.43	6,876.34	0.00	6,876.34	0.00
TOTAL NET BACKPAY:	$5,669.51						

Following his discharge, Hammons registered for work on the Union's employment call list and visited various jobsites two–three times a week seeking work. On May 11, 2004, he obtained employment with Benchmark Construction, a union contractor that made benefit payments into the appropriate union trust funds.

D. Bob King

King began working for Respondent on December 16, 2002. Respondent laid King off on February 13, 2003, and rehired him on March 23, 2003. On July 31, 2003, Respondent listed King as a voluntary quit upon his incarceration. Thereafter, Respondent rehired King on September 11, 2003, and he continued working for Respondent until his unlawful termination on March 30, 2004. At the time of his termination, Respondent employed King as a carpenter on SWWTP. Respondent paid King $18.33/hours plus, in compliance with the prevailing wage requirement, $6.65/hours in lieu of fringe benefits. Respondent unlawfully terminated King on March 30, 2004. The General Counsel fixes King's make-whole period from date of termination to January 18, 2005, when King returned to work for Respondent. Thereafter, King voluntarily terminated him employment with Respondent on February 11, 2005.

The General Counsel computed King's gross backpay for the make-whole period based on the allegedly comparable earnings of the following carpenters employed by Respondent during the make-whole period as indicated:

James Moody	04/03/04—08/21/04
David Mobley	08/28/04—01/15/05

The General Counsel computed King's net backpay for the make-whole period by subtracting his alleged calendar quarter net interim earnings from his calendar quarter gross backpay, arriving at the following figures:

Quarter	Gross Backpay	Prevailing Wages	Total Gross Backpay	Interim Earnings	Expenses	Net Interim Earnings	Net Backpay
II/04	$9,641.74	$3,202.00	$12,843.74	$6,721.80	$7.50	$6,714.30	$6,129.44
III/04	8,569.67	2,978.75	11,548.42	9,843.25	0.00	9,843.25	1,705.17
IV/04	8,030.20	2,917.94	10,948.14	9,116.40	67.50	9,048.90	1,899.24
I/05	1,535.17	548.64	2,083.81	262.40	0.00	262.40	1,821.41
TOTAL NET BACKPAY:	$11,555.26						

Following his discharge, King secured the following employment for the approximate following dates:

04/14/04 to 04/30/04	Travis Meyers	
05/10/04 to 10/30/04	J.C. Industries	Springfield
11/12/04 to 12/23/04	Donco	

King's listed expenses reflect personal vehicle costs incurred while seeking interim employment.

III. DISCUSSION

A. Legal Principles

The general principles in determining backpay are well established: the General Counsel's must show the gross backpay due each claimant, i.e., the amount the employees would have received but for the employer's illegal conduct. Any backpay computation formula that closely approximates the amount due, if it is not unreasonable or arbitrary in the circumstances, is acceptable. *Midwestern Personnel Services,* 346 NLRB No. 58 (2006); *Performance Friction Corp.,* 335 NLRB 1117 (2001); *Reliable Electric Co.,* 330 NLRB 714, 723 (2000) (citations omitted.) The comparable or representative approach to determining backpay is an accepted methodology. *Performance Friction Corp.,* supra at 1117.

The burden is on Respondent to establish any affirmative defenses that would mitigate its liability, including the amount of interim earnings to be deducted from the backpay amount due, and any claim of willful loss of earnings. *Midwestern Personnel Services,* supra at slip op. 2.

Further, the Board has stated,

> [R]emedial questions implicate two statutory principles that must be applied. The first principle is that the remedy should restore the status that would have obtained if Respondent had committed no unfair labor practice. The second principle is that any uncertainty and ambiguity regarding the status that would have obtained without the unlawful conduct must be resolved against the Respondent, the wrongdoer who is responsible for the existence of the uncertainty and ambiguity [citations omitted]. *Campbell Electric Co., Inc.,* 340 NLRB 825, 826 (2003).

B. Respondent's Affirmative Defenses

Respondent raises a number of affirmative defenses to the General Counsel's backpay calculations. Respondent asserts

that the prevailing wage rate for employees on the SWWTP job was calculated so as to bringing nonunion employees' compensation into sync with wage and benefit rates paid for union covered employment. That being the case, Respondent argues, if interim earnings resulted from employment under a union contract that provided for fringe benefits, the comparable monetary worth of such benefits must be added to the interim earnings. To do otherwise, Respondent contends, would result in a windfall to the discriminatee. Counsel for the General Counsel asserts that the Board will recognize the offset of interim benefits only against equivalent benefits provided by Respondent, which benefits do not exist here.[9] Counsel for the General Counsel's argument is supported by *Tualatin Electric,* 331 NLRB 36 (1997). In pertinent part of that case, as in the present, certain of the employer's wages reflected rates required on prevailing wage jobs and representing compensation in lieu of benefits. The Board affirmed without comment the administrative law judge's conclusion that interim employer fringe benefit payments are not an appropriate offset to gross wages. Accordingly, I reject Respondent's argument.

Respondent also contends that all interim earnings in a given quarter must be deducted from backpay owed in that quarter even if the earnings occurred after the backpay obligation ended. Specifically, Respondent argues that although the make-whole period for Estenson ended on June 5, 2004, the wages he received from June 2004 employment after that date must be deducted from net backpay for the second quarter of 2004. Respondent similarly argues that although the make-whole period for Hammons ended on August 21, 2004, his wages from employers other than Respondent earned through September 2004 should offset backpay during that quarter. Under established Board procedure, discriminatees are entitled to backpay for the period between unlawful discrimination and a valid offer of reinstatement. See NLRB Casehandling Manual (Part 3) Compliance Proceedings, Sec. 10530.2 (defining backpay period as "beginning when the unlawful action took place and ending when a valid offer of reinstatement is made") and Sec. 10542.2 ("Earnings During Periods Excepted from Gross Backpay Not Deductible"). Respondent has offered no authority to support its argument that an interim earnings offset must continue beyond the end of the backpay period, and it may be inferred from *Painters Local 419 (Spoon Tile Co.),* 117 NLRB 1596 (1957),[10] that the Board would not endorse such a position. In *Spoon Tile Co.,* the Board stated that its "practice is that during a period when no gross earnings are attributable to a discriminate . . . no deductions are made either for interim earnings or willful loss during this same time." Id at 1598. Accordingly, I reject Respondent's argument.

To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment. *Midwestern Personnel Services,* supra at slip op. 2. It is the respondent's burden to demonstrate affirmatively that the discriminatee failed to exercise reasonable diligence in searching for work. Id. Respondent maintains that the discriminatees did not make a genuine effort to find interim employment following their discharges. In support of this position, Respondent presented testimony from Roger Guida (Guida), Respondent's project manager at SWWTP, who opined that during the relevant make-whole period herein, a good qualified carpenter in the Springfield area should be able to find employment in no more than 2 or 3 weeks. As to laborers, in Guida's opinion, anybody that wanted to find work could do so. Guida's testimony was based solely on his general observations of company hiring efforts and applicant responses at SWWTP. In spite of his assertion that employment for qualified carpenters abounded in the area, Guida agreed that Respondent was able to amass a pool of applications from which it could select hirees and that it was never strapped for labor, which suggests that the supply of construction workers well exceeded the demand. As Guida's opinion is based on imprecise and even vague factors and as Respondent's admitted surplus of applicants tends to contradict his opinion, it has little probative value. See *Midwestern Personnel Services,* supra at slip op. 3.

Respondent contends that monies the discriminatees received from the Union should be counted as interim earnings and deducted from gross backpay. The Board has held that money received from a union should be deducted where the amounts received constitute wages or earnings resulting from interim employment, but unearned income and collateral benefits are not interim earnings. *United Enviro Systems,* 314 NLRB 1130, 1131 (1994). The burden of proving that monetary amounts are wages rather than collateral benefits is on Respondent,[11] which burden Respondent has not met herein.

Respondent objects to the General Counsel's use of more than one representative employee in calculating backpay for Estenson, Hammons, and King. Respondent argues that the General Counsel is restricted to using one single employee per discriminatee as a comparable employee. In selecting comparable employees for backpay analysis purposes, compliance officer Fetsch considered that, but for Respondent's discrimination, Estenson, Hammons, and King would have been available to perform hours worked by any less senior carpenters, even though the less senior carpenters may have varied. The General Counsel's approach was reasonable, particularly in the context of the construction industry, where one single comparator would be unlikely to cover the entire backpay period.[12]

Citing *Aneco, Inc. v. NLRB,* 285 F.3d 326 (4th Cir. 2002), Respondent further argues that the General Counsel abuses his discretion by presuming that Estenson, Reynolds, and

[9] As counsel for the General Counsel points out, fundamental differences exist between payment of wages, which are immediately and unrestrictedly available to an employee, and payments into benefit programs, the proceeds of which depend on the potentially uncertain fulfillment of specific, prerequisite conditions.

[10] Enfd. 242 F.2d 477 (10th Cir. 1957).

[11] *Rice Lake Creamery Co.,* 151 NLRB 1113, 1131 (1965), enfd. as modified 365 F.2d 888 (D.C. Cir. 1966).

[12] As Senator Humphrey, reporting from the Committee on Labor and Public Welfare (S. Rep. No. 1509, 82d Cong. 2d Sess. (1952), pointed out, the building and construction industry is characterized by casual, intermittent, and often seasonal employer/employee relationships on separate projects. The Board also recognized that the construction industry is one "where workers change employers from day to day or week to week." *James Luterbach Construction Co.,* 315 NLRB 976, 983 (1994).

Hammons, who were union organizer applicants (salts) would have worked more than a short period of time had they been offered reinstatement earlier than they were. The Fourth Circuit set no such axiom. Rather the court found the employer in *Aneco* presented specific evidence to rebut any presumption that the discriminatee therein would have completed an uninterrupted five-year employment period but for the employer's discrimination, an evidentiary burden that the Board clearly requires. See *Diamond Walnut*, supra at 1132–1133, wherein the Board noted its decision in *Aneco, Inc.,* 333 NLRB 691 (2001) requiring the respondent to "present 'specific evidence' of factors that would have led to the discriminatee's departure from work." Id at 1132–1133. Here, Respondent presented no specific factors to show that any discriminatee would not have continued his employment with Respondent during the assigned backpay period, had he not been unlawfully terminated. Accordingly, I reject this argument.

Respondent also argues that in calculating backpay the General Counsel did not follow the Board's Casehandling Manual (Compliance) in a number of instances. While compliance with Casehandling Manual provisions is the better practice, strict adherence is not a legal mandate. Moreover, Respondent has not shown that the General Counsel failed substantially to follow the compliance manual's guidelines. Accordingly, I reject Respondent's arguments in this regard.

Respondent requests that the General Counsel be ordered to give Respondent a full explanation of any interest computations with full documentation of computerized or other calculations. Respondent has neither made cogent argument nor pointed out miscalculation that permits identification of specific issues related to interest calculations. Therefore, I decline to order the General Counsel to provide documentation of interest calculations beyond its customary and discretional practices.

C. Brian Estenson

As to Estenson's calculated backpay, Respondent argues that the General Counsel inappropriately utilized Bruce Wales as a comparable employee for the period of February 21 to March 13, 2004, during which period Wales worked as a carpenter foreman at a rate $1 higher than carpenter journeyman wages. Respondent did not refute the General Counsel's conclusion that the position of foreman carpenter was a standard progression for Respondent's journeyman carpenters but asserted that Estenson would likely have declined any nonunit position such as carpenter foreman where he would "have no vote or voice in a union election case." So speculative an objection does not justify eliminating Wales as a comparable employee, and the calculation stands.

Respondent argues that the approximately 6-week gap between the employment of comparators Bruce Wales and Dallas Black demonstrates the unreliability and inappropriateness of their use as comparators. It is true that during that period of time, no carpenter less senior to Estenson was on Respondent's payroll. Resuming backpay liability for Estenson when Dallas Black was hired requires an hypothesis that Estenson could have been recalled to employment at SWWTP at that time. While such a premise may be refutable, it is not unreasonable, and as the courts and the Board have generally indicated, the backpay claimant receives the benefit of any doubt. See *Midwestern Personnel Services,* supra; *United Aircraft Corp.,* 204 NLRB 1068 (1973). Respondent further argues that any interim earnings that accrue during such hiatus periods must be applied against backpay assessed during that same quarter. Respondent has not provided authority for its position, and, as stated earlier, the Board's practice is that "during a period when no gross earnings are attributable to a discriminate . . . no deductions are made either for interim earnings or willful loss during this same time." *Spoon Tile Co.*, supra at 1598. Accordingly, I reject Respondent's argument.

Respondent also argues that Estenson concealed earnings during the fourth quarter of 2004 from the Carpenters Union and SDS. No evidence supports Respondent's assertion, and I disregard it.

D. Ryan Reynolds

Prior to his discharge, Reynolds worked fewer than 40 hours in all weeks but two. Daniel Landers, whom the General Counsel designated as a comparable employee, worked 19 percent more hours during Reynolds' make-whole period than Reynolds worked during his pretermination work period. Respondent contends that Reynolds' work record demonstrates he would have worked only 81 percent of the work hours available during the make-whole period and that, therefore, his gross back pay figure should be decreased by 19 percent. Guida testified that Reynold's reduced work hours were due to his having called in sick "quite a bit" and having taken discretionary time off for school.

Counsel for the General Counsel does not dispute that Reynolds logged comparatively fewer work hours than Daniel Landers. Counsel argues, however, that the record does not contain sufficient evidence to show whether Reynolds' 19-percent work attenuation was based on discretional work ethic or persistent personal circumstances rather than on ad hoc factors, including work availability. If Reynolds' lower work hours were the result of his work ethic or persistent personal circumstances, it is reasonable to infer that those circumstances would continue throughout the backpay period with a consequent work pattern of fewer hours than the norm. In that case, it would be fair to reduce his backpay by 19 percent. If, on the other hand, Reynolds' lower work hours resulted from transient, situational factors or even jobsite work unavailability, it is reasonable to assume that he would have worked hours similar to those worked by a comparably situated employee. On the instant record, the evidence isn't clear one way or the other. Guida's testimony, unsupported by documentary evidence, was not persuasive, and, in any event, does not answer the question of whether the alleged factors (illness and school attendance) would have persisted through the backpay period. The Board applies a general rule that Respondent, as the wrongdoer, must establish any facts to negate or mitigate its backpay liability,[13] and, as stated above, uncertainties in evidence are to be resolved against the wrongdoer. Accordingly, I resolve this particular uncertainty against Respondent and find Daniel Landers

[13] V*elocity Express, Inc.,* 342 NLRB 888, 890 (2004); *Aneco, Inc.,* 333 NLRB 691 (2001), enf. denied 285 F.3d 326 (4th Cir. 2002).

to be an appropriate comparable employee for backpay calculation purposes.

Respondent argues, essentially, that Reynolds willfully failed to look for interim employment because he did not seek work as a laborer, the job he had with Respondent. Willful loss of earnings is one of the affirmative defenses Respondent must prove to mitigate its liability. Discriminatees are not limited to seeking employment in their prior employment sphere in order to demonstrate good-faith efforts to mitigate damages. The Board has found a discriminatee who started his own business, albeit unsuccessfully, and learned a new skilled trade, albeit without finding work in it, nonetheless demonstrated a good-faith effort. *Weldun International,* 340 NLRB 666 (2003). Respondent has not, therefore, met its burden of showing that Reynolds failed to make reasonable efforts to find interim employment. Respondent further objects to the expenses claimed by Reynolds as excessive but again has failed to show, other than by simple assertion, that the expenses were excessive or unnecessary to Reynolds' mitigation of damages. Respondent also contends that Reynolds claim for expenses should be rejected as it is uncorroborated by documentary evidence and as the equipment that forms a portion of the expenses remain in Reynolds' possession as undepreciated assets. The Board neither requires corroboration for expenses nor considers whether equipment purchased as attendant aids to interim employment may have outlived the interim employment. See *Coronet Foods, Inc.,* 322 NLRB 837 and fn 4 (1997), enfd. in part 158 F.3d 782 (4th Cir. 1998). Therefore, I reject Respondent's defenses in these regards.[14]

E. Sterling Jason Hammons

As to Hammons' backpay, Respondent again argues that the General Counsel is restricted to using one single employee as a comparable employee. For the reasons set forth above regarding computations for Estenson, I reject this argument. Relying on Guida's testimony of the relevant labor market, Respondent also argues that Hammons "has not shown sufficient evidence that he has diligently sought work as a carpenter and has not met his duty to mitigate his backpay. . . ." Respondent misstates the burden of proof as to mitigation of backpay, which burden falls on Respondent. See *Midwestern Personnel Services,* and cases cited therein, supra at slip op. 2 ("It is the respondent's burden to demonstrate affirmatively that the discriminatee failed to exercise reasonable diligence in searching for work."). Moreover, as stated above, I have discounted Guida's opinion of the area labor market during the backpay periods relevant to the discriminatees. Accordingly, I reject this argument, as well.

Respondent also argues that Hammons failed to make sufficient effort to mitigate his backpay claim, as his only reported effort to obtain other work was to register at the union referral hall. Respondent's assertion in this regard apparently overlooks Hammons' hearing testimony. Although Hammons agreed that he noted only "registered for work at union hall" in the job search information portion of the backpay questionnaire he completed for the Regional Office, he testified that he also submitted applications to all the large union contractors in the area and investigated work opportunities at various jobsites.[15] As tribute to his efforts, the evidence shows Hammons had significant interim earnings in two of the three quarters comprising his backpay period. In these circumstances, Respondent has failed to show that Hammons did not search for work with reasonable diligence.

F. Bob King

Respondent essentially argues that King's spotty work history and his postreinstatement voluntary quit demonstrate a disinterest in the job that either significantly reduces Respondent's backpay liability or curtails it altogether.[16] King began working for Respondent on December 16, 2002. During King's 2003 employment, he experienced two gaps in employment: an involuntary layoff from February 13 to March 23, and an absence from July 31 to September 11, consequent on his incarceration. King worked for Respondent without further hiatus from September 11, 2003, until his unlawful termination on March 30, 2004. After Respondent reinstated King on January 18, 2005, he worked until February 11, 2005, whereupon he voluntarily terminated his employment.

Respondent unlawfully discharged King, which entitled him to reinstatement and backpay; Respondent's valid offer of reinstatement to King tolled the backpay. Those legal realities are in no way impacted by King's pretermination work history with Respondent or his postreinstatement voluntary termination. The question of whether King may have had gaps in interim employment during which Respondent should not be responsible for backpay may be ascertained without reference to King's work record with Respondent. In fact, King secured interim employment within 2 weeks of his unlawful termination and seriatim employment thereafter with only such brief intervals as might reasonably be expected to accompany job searches. Respondent has presented no evidence that King did not put forth an honest, good-faith effort to find or to retain interim work. *Diamond Walnut Growers, Inc.,* 340 NLRB 1129 (2003), relied on by Respondent, is inapposite. In *Diamond,* evidence showed that whenever the employer would have offered a particular job to the discriminatee, he would have resigned after 6 weeks. In the instant matter, Respondent has presented no evidence to justify an inference that King would have resigned employment within 4 weeks of any offer of reinstatement. The mere fact of King's having quit 4 weeks after his 2005 reinstatement does not provide the necessary evidence.

[14] As to Respondent's contention that Reynolds committed perjury in an unrelated matter, which precludes backpay, I denied Respondent's motion to introduce allegedly supportive evidence. The proffered evidence was too tangential and too unlikely to demonstrate perjury to be probative to the instant issues.

[15] Even assuming Hammons' primary effort to obtain interim employment was limited to registration at the union hall, such does not show lack of diligence. See *Midwestern Personnel Services,* supra at slip op. 4, citing *Tualatin Electric, Inc.,* supra (obligation to mitigate met when discriminatees follow normal pattern of seeking employment through union hiring hall).

[16] Citing Tr. 354–358, Respondent's posthearing brief asserts that Guida testified King worked less than 40-hour weeks for Respondent because of illness or other unavailability. Tr. 354–358, however, reflect Guida's testimony regarding Reynolds, not King.

Conclusion

The General Counsel has met his burden of proving gross backpay as to each of the discriminatees, herein, and Respondent has not met its burden of proving any affirmative defenses. I find the General Counsel's calculations to be fair, reasonable, and accurate approximations of the earnings the discriminatees would have enjoyed had they not been unlawfully terminated. See W*eldun International, Inc.*, 340 NLRB 666 (2003).

I recommend that Respondent, John T. Jones Construction Co., Inc., be ordered to pay the following amounts to the employees listed below plus interest[17] accrued to the date of payment:

Brian Estenson	$12,932.80
Ryan Reynolds	7,005.79
Sterling Jason Hammons	5,669.51
Bob King	11,555.26

[17] See *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

SUPPLEMENTAL ORDER

On the basis of the foregoing, and pursuant to Section 10(c) of the Act, I recommend that the Board issue the following supplemental Order. [18]

IT IS HEREBY ORDERED that Respondent, John T. Jones Construction Co., Inc., its officers, agents, successors, and assigns, shall forthwith make whole the following individuals by paying each of them, respectively, the sum set forth, plus interest and minus tax withholdings, if any, required by Federal and State laws:

Brian Estenson	$12,932.80
Ryan Reynolds	7,005.79
Sterling Jason Hammons	5,669.51
Bob King	11,555.26

Dated: Washington, D.C. June 8, 2006

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended supplemental Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.